

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRANDON MARCUS RESCH,

Plaintiff,

v.

JERMEY BUSH, et al.,

Defendants.

Case No. 1:21-cv-293

HON. JANET T. NEFF

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OPINION AND ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Defendants filed a motion for summary judgment, arguing that Plaintiff failed to exhaust his administrative remedies. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R & R), recommending that Defendants' motion be granted and that this case be closed (ECF No. 46). The matter is presently before the Court on Plaintiff's objections to the Report and Recommendation (ECF No. 49). In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order.

Plaintiff's objections are without merit. The Magistrate Judge carefully and thoroughly considered the record, the parties' arguments, and the governing law. The record establishes that Plaintiff failed to exhaust his administrative remedies because the MDOC rejected Plaintiff's Step II appeal as untimely. The Magistrate Judge correctly determined that Plaintiff's affidavit did not

create a genuine issue of material fact because it contains conclusory statements and was based in part on Plaintiff's beliefs (ECF No. 46 at PageID.422-423). There is no evidence that the grievance process was unavailable to Plaintiff. Having reviewed the record before the Magistrate Judge, the Court discerns no error in the Magistrate Judge's conclusion that Plaintiff did not properly exhaust his administrative remedies with respect to the incidents alleged in the amended complaint against Defendants Bush or Mulligan.

Plaintiff also makes new arguments and presents new evidence that he failed to raise before the Magistrate Judge. The Court is disinclined to review the merits of Plaintiff's new argument or accept new evidence, which could have easily been raised in Plaintiff's response brief. "[W]hile the Magistrate Judge Act, 28 U.S.C. § 631 et seq., permits de novo review by the district court if timely objections are filed, absent compelling reasons, it does not allow parties to raise at the district court stage new arguments or issues that were not presented to the magistrate." *Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000). "The Magistrate Act was not intended 'to give litigants an opportunity to run one version of their case past the magistrate, then another past the district court.'" *Jones-Bey v. Caruso*, No. 1:07-cv-392, 2009 WL 3644801, at *1-2 (W.D. Mich. Oct. 30, 2009) (citation omitted) (relying on Sixth Circuit authorities and "the seemingly uniform practice of federal courts nationwide" to decline to consider a new argument).

In sum, Plaintiff's arguments fail to demonstrate any factual or legal error in the Magistrate Judge's analysis or conclusion. Therefore, this Court adopts the Magistrate Judge's Report and Recommendation as the Opinion of this Court. A Judgment will be entered consistent with this Opinion and Order. *See* FED. R. CIV. P. 58. Because this action was filed *in forma pauperis*, this Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal of this decision would not be

taken in good faith. *See McGore v. Wrigglesworth*, 114 F.3d 601, 610 (6th Cir. 1997), overruled on other grounds by *Jones v. Bock*, 549 U.S. 199, 206, 211-12 (2007).

Accordingly:

IT IS HEREBY ORDERED that Plaintiff's Objections (ECF No. 49) are DENIED and the Report and Recommendation of the Magistrate Judge (ECF No. 46) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that the Motion for Summary Judgment (ECF No. 34) is GRANTED. Plaintiff's claims against Defendants Bush and Mulligan are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that Plaintiff's Motion to Stay Proceedings is DISMISSED AS MOOT.

IT IS FURTHER ORDERED that this Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of this decision would not be taken in good faith.

Dated: February 2, 2023

/s/ Janet T. Neff

JANET T. NEFF
United States District Judge